United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

No. 76-6122

COUNTY OF SUFFOLK, et al.,

Plaintiffs-Appellees,

v.

SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants,

NATIONAL OCEAN INDUSTRIES
ASSOCIATION, et al.,

Intervenor-Appellants.

THE STATE OF NEW YORK and the
RESOURCES DEFENSE COUNCIL, INC.,

Plaintiffs-Appellees,

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR,

Defendant-Appellant.

BRIEF OF AMICUS CURIAE TRI-COUNTY COMMITTEE

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PRELIMINARY STATEMENT

This brief is being submitted by the Tri-County Committee to Control Offshore Development (hereinafter referred to as the TCC). This committee is composed of the elected representatives of the County governments and Planning Boards of Atlantic, Cape May and Ocean Counties of the State of New Jersey. These three counties comprise virtually all of the coastal zone immediately adjacent to the area of OCS Sale No. 40.

Since the potential effect on our coastal environment by the response of the Department of Interior (DOI) to our future local and county and state governmental actions concerning offshore and onshore OCS development is at the center of the issue before the Court, we offer this brief as a friend of the Court to present aspects of Judge Weinstein's decision which might not otherwise be raised by other parties.

In summary this amicus brief outlines the negative environmental impacts that will result because DOI failed to provide adequate safeguards and failed to analyze the impacts of not providing adequate safeguards for coastal resources.

ISSUE PRESENTED

Judge Weinstein framed the issue before him as,

> whether the independent powers of sovereign states to control their own lands to prevent certain uses by private oil companies can so frustrate federal administrators assumptions that they must be considered under NEPA. (Opinion page 54)

The District Court ruled that, "[w]ithout an analysis of these state provisions and of the probable extent of state cooperation or opposition, a realistic appraisal of the impact . . . on the environment is not possible",

and therefore, the failure to include a "meaningful discussion of this vital dimension of the environmental problem" constituted a violation of NEPA, and that such a violation justified a preliminary injunction. (Opinion at 66)

The issue before the Court is whether the District Court properly applied the controlling standards in reaching that ruling.

STATEMENT OF THE CASE

This litigation was commenced in February, 1975 by the New York Counties of Nassau and Suffolk and several other local governments in those counties (hereinafter referred to as the Long Island plaintiffs) when the Long Island plaintiffs filed a complaint seeking to enjoin the Secretary of the Interior from proceeding with any aspect of the National Accelerated Outer Continental Shelf Leasing Program and OCS Sale No. 40.

Among the various Federal Statutes alleged to have been violated and the grounds upon which the Long Island plaintiffs sought relief were the National Environmental Policy Act (NEPA), 42 U.S.C.S. 4321, the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq., and the Outer Continental Shelf Lands Act (OCS LA), 43 U.S.C. § 1331 et seq.

On June 29, 1976 another suit was started (76 C 1229). The State of New York and the Natural Resources Defense Council, Incorporated (NRDC) (hereinafter referred to as the NY/NRDC plaintiffs) filed a complaint against the Secretary of the Interior seeking injunctive relief against the National Accelerated OCS Leasing Program and against Sale No. 40. The two actions were consolidated for purposes of discovery and trial.

On June 30, at a preliminary hearing before the District Court, the government announced the intention to hold Sale No. 40 on August 17, 1976.

On July 15, 1976 the NY/NRDC plaintiffs filed a motion for preliminary injunction against the Secretary of the Interior seeking to enjoin the National Accelerated OCS Leasing Program and OCS Sale No. 40.

On July 20, 1976, the New York Gas Group (hereinafter referred to as NYGAS) and the National Ocean Industries Association (hereinafter referred to as NOIA) intervened as defendants.

On August 2, 1976, the planning directors of the New Jersey Counties of Cape May and Ocean, representing the Tri-County Committee, testified for the plaintiffs in the evidentiary hearings before Judge Weinstein. The Atlantic County Planning Director concurred with and participated in the development of the Tri-County position as presented in testimony by the other two counties. Evidentiary hearings commenced on July 23rd and consumed three weeks. Counsel for the parties argued the motions for a preliminary injunction on August 11, 1976. Thereafter, on August 13, 1976, Honorable Jack B. Weinstein issued a preliminary injunction against Lease Sale No. 40.

FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

The Long Island and NY/NRDC plaintiffs sought to enjoin OCS Sale No. 40 on the grounds that the Final Environmental Impact Statement (FEIS) prepared for this Sale by the Department of the Interior (DOI), was inadequate and defective in law. Plaintiff's witnesses testified to various inadequacies of the FEIS in its consideration of possible dangers to environmental resources (Transcript 935 & 1155), in its consideration of the onshore impacts of federally sanctioned offshore development (Transcript 529) and in its consideration of safeguards attached to the Leases as conditions of the Sale (Transcript 1569 & 1610).

1. During the administrative process in connection with both the accellerated leasing program and OCS Sale No. 40, and before the District Court, representatives of local and county governments from the TCC region asserted that (A) onshore development and pipeline corridors must be consistent with State, regional and local plans and ordinances, most of which bar pipelines and other oil related development, and (B) that a best available technology cause must be added to the Stipulations of OCS Sale No. 40, as was done for OCS Sale No. 35, and (C) that the TCC was ready and willing to pursue those administrative, legislative, and legal remedies to accomplish these objectives.

2. Section 102 (2) (C) of NEPA requires all agencies of the Federal Government to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on, inter alia, the environmental impacts of the proposed actions.

3. Office of Management and Budget Circular A-95, establishes a system of State and Areawide Clearinghouses (Atlantic, Cape May and Ocean County Planning Boards have been so designated) for the purpose of assuring maximum consistency of Federal and Federally assisted projects with State, areawide and local comprehensive plans and to assist Federal Agencies administering such programs in determining whether the project is in accord with applicable Federal Law. (Fed. Reg. Vol. 41, No. 8 at 2053) (emphasis added) Department of the Interior Final Directives issued as Part 511, Chapter 1 through 6 of the Department of Interior Manual, became effective on April 29, 1976. Among other general and program legislation which requires the Department to work with State and local governments Chapter 1 lists:

National Environmental Policy Act, 83 Stat 852; 42 USC 4321

Federal Water Pollution Control Act, 86 Stat 816; 33 USC 1151

Outer Continental Shelf Lands Act, 67 Stat 462; 43 USC 1331-43

Coastal Zone Management Act, 86 Stat 1280; 16 USC 1451

Chapter 3 states in part at 511.3.1:

> The purpose of this chapter is to: (B) provide bureaus with information on the relationships of proposed direct Federal development projects, leases, licenses, permits and related activities to State, areawide, and local plans and programs and to assure the maximum feasible consistency of Federal development with State, areawide and local plans and programs.

and at 511.3.4:

> Federal-wide procedure calls for (B) Assuring that the proposed action is consistent or compatible with State, areawide and local plans and programs identified in the course of such consultations.

4. The outer Continental Shelf Lands Act, 67 Stat 462 provides at Section 5(a) (1):

> ...The Secretary may at any time prescribe and amend such rules as he determines to be necessary and proper

in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding and other provisions herein, such rules and regulations shall apply to all Operations conducted under a lease issued or maintained under the provisions of this Act.

and at Section (5) (a) (2):

...The issuance and continuance in effect if any lease, or if any extension, renewal, or replacement of any lease under the provisions of this Act

shall be conditioned upon compliance with the regulations issued under this Act and in force and effect on the date of issuance of the lease. . . (emphasis added)

and at Section 5 (b) (1):

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of this lease, or of the regulations issued under this Act and in force and effect on the date of issuance of the lease, . . . such lease may be cancelled by the Secretary. (emphasis added)

and at Section 5 (b) (2):

Whenever the owner of a producing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act and in force and effect on the date of issuance of the lease. . . . such lease may be forfeited and cancelled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 4 (b) of this Act. (emphasis added)

and at Section 8 (b) (4):

An oil and gas lease issued by the Secretary pursuant to this section shall contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease. (emphasis added)

5. The Form of Lease (Form 330-1, May 1976) to be used for OCS Sale No. 40 states:

Section 10. Remedies in Case of Default. (a) Whenever the Lessee fails to comply with any of the provisions of the Act, or of this lease, or of the regulations

issued under the Act and in force and effect on the effective date of this lease, the lease shall be subject to cancellation in accordance with the provisions of Section 5 (b) of the Act: . . . (emphasis added)

(b) Whenever the lessee fails to comply with any of the provisions of the Act, or of this lease, or of any regulations promulgated by the Secretary under the Act, the Lessor may exercise any legal or equitable remedy or remedies which the lessor may have, including appropriate action under the penalty provisions of Section 5 (a) (2) of the Act; however (emphasis original) the remedy of cancellation of the lease may be exercised only under the provisions of Section 5 (b) and Section 8 (i) of the Act.

6. In the promulgation of Section 250.34 CFR,"Drilling and Development Programs", reprinted on pages 784-788 of the FEIS for OCS Sale No. 40, the secretary was careful to point out that "leases may be cancelled for failure to comply with 'regulations issued under this Act and in force and effect of the date of issuance of the lease.'" (emphasis added)

The government, NYGAS and NOIA defendants presented several expert witnesses to rebut the contentions of the plaintiffs.

The testimony of the various expert witnesses was supplemented by extensive documentary material and numerous affidavits which were submitted as evidence in support of the several positions.

At the conclusion of the evidentiary hearings Judge Weinstein, held that NEPA was violated on the grounds that the FEIS did not adequately analyze the environmental impact of the possiblity that State and local actions could be taken to force the use of tankers instead of pipelines.

LEGAL ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED THE INJUNCTION

The standard for granting a preliminary injunction has frequently been stated by this Circuit, and in Triebwasser & Katz v. American Telephone & Telegraph Co., 535 F.2d 1356, 1358 (2d Cir. 1976), the standard was reaffirmed:

> the familiar test of this Circuit (is) that a preliminary injucntion will issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. (emphasis by the Court)

The Court added:

> . . . At the outset, we should note that this language of the second prong of the. . . test does not eliminate the basic obligation of the plaintiff to make a clear showing of the threat of irreparable harm. That is a fundamental and traditional requirement of all preliminary injunctive relief. . .(at 1359)

It is precisely these standards that Judge Weinstein used when, applying a "rule of reason", he properly and correctly concluded that plaintiffs "will likely succeed on the merits and that they will suffer irreparable harm if the injunction is not granted at this time" (Opinion page 73).

A. The District Court Correctly Found A Substantial Violation of NEPA

The Court below stated:

> the real bite in the environmental control exercised by the States is . . . in their licensing capacity. (Opinion p.64)

States, counties and localities have substantial police power to control and affect land use decisions through their licensing, permitting

and review functions. In New Jersey, an application by an OCS operator to construct onshore facilities could require a multitude of permits from those three levels of government. The Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et. seq., Coastal Wetlands Act, N.J.S.A 13:9A-1 et. seq., and various riparian acts are among the relevant State statutes. New Jersey's counties review development proposals along county roads through their site plan-subdivision regulations and county comprehensive planning. The State and county levels also have review authority of federal projects through the Office of Management and Budget A-95 review process which Department of the Interior has incorporated into its leasing program (Federal Register, Vol. 41, No. 41, page 8808). Localities exercise land use police power through their zoning and master planning functions. Most of the local governmental entities' zoning ordinances in the New Jersey coastal zone do not provide for the development of onshore OCS development.

To bring a Federal action into conformity with State, areawide and local comprehensive plans and programs and local land use ordinances may involve conditions and stipulations attached to permits and licenses required by State and local governments which might be unacceptable to the Lease under OCS Sale No. 40. Yet the <u>environmental impact</u> of Federal responses to State and local governments attempting to exercise their powers of land use control relative to OCS Sale No. 40 has not even been discussed in the EIS. Judge Weinstein clearly forsaw this:

> The issue is whether these independent powers of sovereign States to control their own lands to prevent certain uses by private oil companies can so frustrate Federal administrator's assumptions that they must be considered under NEPA. (Opinion p. 54).

and correctly concluded that the omission of such discussion and analysis constituted a clear and substantial violation of the National Environmental Act.

The denial of any one of the permits mentioned above, if required by law, would result in the applicant having to seek other alternatives, possibly including environmentally degrading alternatives such as tankering and offshore oil and gas processing. Judge Weinstein focused on the environmental effects of a State decision to ban pipelines at the three mile limit. He considered the failure of the DOI-FEIS to address this issue a violation of NEPA sufficient in law to order a full trial and issue a preliminary injunction. The FEIS in several locations states that the actions of State and local governments could substantially affect the viability of the assumption that pipelines would be used to transport oil produced by OCS Sale No. 40 to shore, and that if pipelines are not viable because of State or local action tankers may have to be used to transport the oil. (FEIS Vol. 1 at 15, 40, 50, 59: Vol. II, pages 428 - 429). Yet, the superficial sketch of world-wide tanker accidents and operations (FEIS Vol.II at 30 - 32) which the Director of the Geological Survey Department of Interior, has characterized as "so misleading and inaccurate that we suggest it be deleted" (FEIS Vol. III at 162) provides no detailed statement as to the environmental impact of using tankers to transport oil from OCS Sale No. 40 to shore.

The Department of the Interior in the FEIS for Deepwater Ports (Vol. 1, page IV at 75 - 82) analyzed a hypothetical oil spill on the

Delaware Offshore Region which indicates the potential magnitude of this environmental impact. This analysis concludes that such a spill "could completely cover the shore from just above Chesapeake Bay to the entrance of the New York harbor" (FEIS, Deepwater Ports, supra at 80) and inflict a total potential loss of $2,800,000,000 in just one tourist season of which $2 billion would be sustained by the State of New Jersey alone. (FEIS, Deepwater Ports, supra at 82). Quoting from Kleppe v. Sierra Club, _____ U.S. _____, _____ S. Ct. _____, 44 U.S.L.W. 5104 (1976), Mr. Justice Marshall in New York v. Kleppe, _____ U.S. _____, _____ S. Ct. _____, 45 U.S.L.W. 3161, 3162 (1976) emphasized that "the essential requirement of NEPA is that before an agency takes major action, it must have taken "a 'hard look' at environmental consequences." " By any rule of reason, oil damage of the magnitude described above is a major, significant environmental impact about which EIS for OCS Sale No. 40 is silent. The failure to include a full analysis of such a vital dimension of the environmental problem is a clear violation of NEPA and Judge Weinstein was correct in so ruling.

B. The District Court Correctly Found Irreparable Injury

Section 102 of NEPA requires that all significant environmental impacts be considered in order that all major federal actions are pursuant to a "careful and informed decision-making process . . . ." Calvert Cliffs' Coordinating Commission, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1115 (D.C. Cir. 1971). (Emphasis added). Federal action in the absence of an adequate analysis of significant environmental impacts is not an informed decision-making process. Scherr v. Volpe, 455 F.2d 1027, 1034 (7th Cir. 1972). Where there is a strong likelihood of success on the merits on a claim that Section 102 has been violated, irreparable harm will be found in the continuation of an uninformed decision-making process and the continued denial of plaintiffs rights under NEPA. Id.; see also, Environmental Defense Fund v. T.V.A., 468 F.2d 1164, 184 (6th Cir.); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287, 295 (D. Ct. D.C. 1971).

DOI's failure to afford the protection mandated by NEPA has put in great jeopardy the environmental well-being of the coastal areas of New Jersey. (see Point IA supra) DOI's failure to adequately analyze all environmental impacts relevant to Lease Sale No. 40 has destroyed the integrity of its decision-making process. The results of the process - the provisions contained in the lease-are clearly illustrative of uninformed decisions. DOI's failure to enforce Section 102 of the Act has resulted in lease provisions which fail to protect the citizens of the state from forseeable environmental danger.

On page 68 of his opinion, Judge Weinstein states: "NEPA was not intended to be a formal paper shuffling exercise. Rather, it was enacted so that decision-makers would be affected by the data accumulated under its mandate." The FEIS (OCS Sale No. 40) at issue herein, despite its cursory and inadequate attention to the impact of State and/or local control, nonetheless acknowledged that:

> Much of what may happen onshore will be determined by constraints placed upon OCS-related industry by State, county and municipal controls. Facilitating the smooth accommodation of OCS induced population would greatly depend upon a timely, coordinated comprehensive effort toward intergovernmental and private sector planning. (FEIS, Vol II at 218)

Yet the structure of OCS Sale No. 40 is noticeably lacking in safeguards relevant to onshore activities and fails to implement the coordination recognized and advocated by DOI. DOI repeatedly advocated necessary and desirable controls and safeguards in the FEIS and failed to implement them in the special lease stipulations and failed to analyze the results of not requiring them. The FEIS is replete with references to DOI's intention to require the "most effective available, the best available and best practicable" equipment. DOI's failure to specify any quality of equipment will clearly be considered when state, county and local governments exercise their land use police powers. Local and state conditions attached to permits of their respective jurisdictions have caused OCS operators, as in southern California, to implement environmentally hazardous actions which have received the blessings of DOI. The FEIS fails to explore this eventuality.

Tri-County planning directors, Jarmer and Thomas, testified before the District Court on the NEPA necessity and environmental practicality of

including proper safeguards as special lease stipulations for OCS Sale No. 40. (Transcript 1569 and 1634). TCC is opposed to OCS Sale No. 40 in its present form. Because of the existing structure of the leases, some of the southern New Jersey counties are fully prepared to prohibit onshore OCS development and pipelines.*

An adequate environmental assessment would have revealed the need to examine what safeguards or stipulations DOI could add as provisions in the lease that would temper State and local action. Additions and amendments to the lease provisions need to be fully considered to avoid the dangerous environmental impacts that could result by proceeding to sale with the leases as presently written. Additional provisions would have been added to the leases had DOI fully considered safeguards that would prompt the various States and localities to permit or license pipelines, landfills or siting of onshore oil-related industrial development in their coastal zone.

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*This fact was not tesitifed to at the motion for a preliminary injunction but represents the present position of the Tri-County Committee.

CONCLUSION

It is respectfully requested that:

1. The Order of the United States District Court granting a preliminary injunction be reinstated.

2. The signing of any and all leases under O.C.S. Sale #40 be prohibited and enjoined pending further order of this Court.

3. Leases already signed under O.C.S. Sale #40, if any, be invalidated.

4. The lease form and stipulations proposed by the Department of the Interior be revised and reformed to comply with N.E.P.A.

5. The Department of the Interior be directed to prepare and promulgate an E.I.S. complying with the requirements of N.E.P.A.

Respectfully submitted,

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